

Exposé

Doctoral Thesis Proposal

(Working Title)

“Invasive Alien Species”

**International Environmental and Trade Law Provisions,
the Regulation (EU) No 1143/2014 on Invasive Alien Species and
its Impacts at the National Level**

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1. Introduction

1.1 Setting the Scene

Invasive alien species (IAS) are considered to be one of the main drivers for biodiversity loss globally. Additionally to environmental damage, they have negative effects on economies and human health. The entering of alien species is not a new phenomenon *per se*. It increased dramatically in the 1970s by approximately 76%, as one of the side effects of booming global trade and international travel. An indicator assessment of the 163 “worst IAS” by the European Environmental Agency (EEA) revealed that the Austrian territory contains 66 of those, amounting to 1, 27 per 1000 km².¹

To counter these effects, the European Union (EU) adopted Regulation 1143/2014 (IAS-Regulation)², which entered into force on 1st January 2015. With this legislative act the EU meets its international commitments, mainly under the Convention on Biological Diversity (CBD)³. The regulation deals with the prevention and management of the introduction and spread of IAS within the EU. Its backbone will be the list of “Invasive Alien Species of Union Concern” under Art 4 IAS-Regulation. The IAS on this list are subject to restrictions, e.g. import bans. Such restrictive measures might interfere with international trade obligations under the relevant agreements of the World Trade Organisation (WTO)⁴.

Additionally, the IAS-Regulation contains a set of obligations for the EU Member States, such as to install effective systems of surveillance and set up structures for custom controls. Member States must adopt action plans to address pathways of IAS into the EU and develop management measures for already widely spread IAS.

The proposed thesis will analyse the inter-linkages between the international provisions and EU law regarding IAS. The Member States’ obligations and administrative mechanisms under the IAS-Regulation will be outlined. Particular focus will be paid to the Austrian legal framework.

1.2 Provisions of International Law

The CBD entered into force on 29 December 1993, has 196 parties and Austria ratified it on 18 August 1993.⁵ The Convention establishes a comprehensive and inclusive regime for conservation of biodiversity by recognizing the intrinsic value of biodiversity to humankind.⁶ The Convention’s three

¹ EEAS, Invasive alien species in Europe (SEBI 010), < <http://www.eea.europa.eu/data-and-maps/indicators/invasive-alien-species-in-europe/invasive-alien-species-in-europe> > (accessed 24.5.2015).

² Regulation 1143/2014/EU, OJ L 317/35.

³ Convention on Biological Diversity (1992) 1760 U.N.T.S. 79.

⁴ Agreement Establishing the World Trade Organization (1994) 1867 U.N.T.S. 154.

⁵ State of ratification: < https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtldsg_no=XXVII-8&chapter=27&lang=en#EndDec > (accessed 24.05.2015).

⁶ Birnie/ Boyle/ Redgwell, International Law & the Environment³ (2009) 613.

main goals are set out in Art 1 CBD: 1) the conservation of biological diversity, 2) the sustainable use of its components, and 3) the fair and equitable sharing of the benefits arising out of the utilization of genetic resources. Art 6 - 20 CBD contain binding commitments whereby Art 8 CBD sets substantive provisions regarding *in situ* conservation. The parties are required to develop national strategies, plans or programmes addressing the conservation and sustainable use of biological diversity. Latter have to be integrated into the parties' national sectoral or cross-sectoral plans, programmes and policies.⁷

Art 8 (h) CBD explicitly addresses alien species threatening ecosystems, habitats or species. Firstly, the parties shall prevent the introduction of such IAS; secondly control or eradicate them. On the 6th meeting of the Conference of the Parties (COP) in 2002, guiding principles for the prevention, introduction and mitigation of impacts of alien species that threaten ecosystems, habitats or species were adopted.⁸ In 2010, the 10th COP meeting reached an agreement on the so-called "Aichi Biodiversity Targets", stating in Target 9 that "By 2020, invasive alien species and pathways are identified and prioritized, priority species are controlled or eradicated, and measures are in place to manage pathways to prevent their introduction and establishment".⁹

Multilateral environmental agreements, especially such concerning the prevention of the introduction of IAS, will inevitably interfere with the objectives and developments in international trade policies. Free trade is often affected by national measures implementing international environmental requirements, causing restrictions on trade in certain goods. The General Agreement on Tariffs and Trade 1994 (GATT 1994)¹⁰ administrated by the WTO puts in place the relevant legal framework for international trade in goods. The WTO was established on 1st January 1995 and has currently 161 members¹¹, among them the EU and its 28 Member States. The European Commission (EC) generally speaks for all its Member States.

Art XX GATT 1994 contains general exceptions permitting measures affecting free trade. Art XX lit (b) GATT 1994 allows Member States to introduce measures that are necessary to protect human, animal or plant life or health. Such measures must meet the requirements set out in the chapeau of Art XX GATT 1994. Hence, measures are illegal if they constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade. The trade in services, such as transport or tourism is regulated in the General Agreement on Trade in Services (GATS)¹² and also includes an exception for aforementioned necessary measures.

⁷ Vgl Art 6 CBD.

⁸ COP 6, Decision VI/23, Alien Species that threaten ecosystems, habitats or species.

⁹ COP 10, Decision X/2, Strategic Plan for Biodiversity 2011-2020.

¹⁰ General Agreement on Tariffs and Trade 1994 (1994) 1867 U.N.T.S. 187.

¹¹ Members and observers < https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm > (accessed 24.5.2015).

¹² General Agreement on Trade in Services (1994) 1869 U.N.T.S. 183.

Additionally, the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement)¹³ is of relevance for import restrictions, necessary for the protection of human, animal or plant life and health. Sanitary and phytosanitary measures must fulfil specific requirements *inter alia* measures must be based on scientific principles, sufficient scientific evidence and a risk-assessment process. Art 3 SPS Agreement encourages states to adopt international SPS standards. International agreed standards in the context of the SPS Agreement are developed by the World Health Organization (WHO) and the Food and Agriculture Organization (FAO), the World Organization for Animal Health (OIE), and the International Plant Protection Convention (IPPC).

A priori, the objectives of the outlined international frameworks of protecting biodiversity and international trade seem to undermine their respective interests. However, environmental protection and the WTO system are not entirely incompatible. A fair balance might be possible, considering environmental as well as trade interests. The ambiguous language, vague and undetermined legal notions are often representing “the lowest common denominator”, which can be considered as inherent characteristic of international agreements. Without doubt, the parties’ challenge to comply homogeneously with all international obligations is difficult.

1.3 European Union’s Provisions

On 22 October 2014 the European Parliament (EP) and the Council adopted the Regulation 1143/2014 on the prevention and management of the introduction and spread of invasive alien species¹⁴. In general the IAS-Regulation applies to all IAS that are changing their natural range with human intervention. Certain exceptions to this broad definition are set forth due to the scope of legislation already in place.¹⁵

The IAS-Regulation builds upon the triad of prevention, minimization and mitigation of adverse impact on biodiversity of the introduction and spread of IAS within the EU.¹⁶ The emphasis is placed on prevention and therefore the EC will adopt a list of IAS of Union Concern – the so-called “Union list”.¹⁷ IAS are included in the Union list after detailed risk assessment pursuant to Art 5 IAS-Regulation and meeting the criteria set out in Art 4 (3) IAS-Regulation. For these IAS restrictive measures apply, such as import bans or prohibition of possession and breeding.¹⁸ Latter restrictions might be extended to IAS, which are not on the Union list but are found to be likely to meet Art 4 (3) IAS-Regulation’s criteria. Such emergency measures can be introduced by Member States having scientific evidence concerning the presence in, or imminent risk of introduction of IAS into

¹³ Agreement on the Application of Sanitary and Phytosanitary Measures (1994) 1867 U.N.T.S. 493.

¹⁴ Regulation (EU) 1143/2014, 22.10.2014, OJ L 317/35 4.11.2014.

¹⁵ Art 2 (2) IAS-Regulation.

¹⁶ Art 1 IAS-Regulation.

¹⁷ Art 4 IAS-Regulation.

¹⁸ Art 7 IAS-Regulation.

their territory.¹⁹ Furthermore, Member States are obliged to establish an effective surveillance system and structures to carry out official controls adding to the effectiveness of preventive measures.²⁰

With the IAS-Regulation Art 8 (h) CBD was incorporated into EU law. The significant threat/damage caused by IAS can justify adoption of measures to prevent, minimise or mitigate adverse impacts of IAS. The system of notification, coordination and EC's implementation acts, backed by a committee and scientific forum, are designed to meet requirements under international trade law. The system's mechanism guarantees comprehensive and coherent action within the EU.

The IAS-Regulation encompasses internationally recognized principles such as "precautionary" and "polluter pays" principle. Additionally, public participation is envisaged regarding management measures and action plans in consistence with the Aarhus Convention²¹. Therefore, it is crucial to analyse the processes leading to the establishment of the Union list and Member States' obligations under the IAS-Regulation. Especially the compliance with international provisions regarding environmental and trade is under scrutiny.

1.4 National Law

The Austrian legal framework with regards to IAS is characterized by fragmentation. This is due to the fact of Austria's federal structure that goes along with a division of competences between the Federation and the Federal States. Pursuant to Art 10 – 15 Federal Constitutional Law (B-VG),²² relevant matters affected by the IAS-Regulation fall within the scope of Federal States' competences. The Federal States regulate matters of nature conservation, hunting and fishing. Art 10 (1) point 10 B-VG sets out that the Federation's power of legislation and execution encompasses forestry and water rights. Despite the division of competences, Art 102 B-VG generally places the "burden" of execution with the Federal State's authorities due to the system of indirect federal administration.

EU Regulations are binding in its entirety and directly applicable in all Member State. It must be kept in mind that it is for the legal system of each Member State to determine the responsibilities assigned to each authority for the execution of EU Regulations. Hence, the IAS-Regulation speaks of competent national authorities.

Foremost the IAS-Regulation lays down the Member States' obligations regarding IAS of Union concern. These obligations encompass the already mentioned surveillance systems, controls, management and action plans. Furthermore, rapid eradication measures are envisaged pursuant to

¹⁹ Art 10 IAS-Regulation.

²⁰ Art 14 and 15 IAS-Regulation.

²¹ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (1998), 2161 U.N.T.S. 447.

²² Federal Constitutional Law (B-VG) Federal Law Gazette No. 1930/1, as amended by Federal Law Gazette I No. 2014/102.

Art 17 IAS-Regulation or effective management measures to minimise the impact of IAS of Union concern. Member States have the discretion to develop national lists of IAS of Member States' concern and may apply restrictive measures pursuant to Art 7 IAS-Regulation in their territory.²³ The Member States' obligations, responsibilities and rights constitute an important part of this thesis.

2. Objective and Methodology

The specific objective of this dissertation is the analysis of the newly adopted IAS-Regulation. The IAS-Regulation and its compliance with the international provisions build the first part of the thesis. The complex intersection between international environmental law, mainly the CBD, and international trade law, respectively GATT 1994 and SPS Agreement will be examined. The relevant provisions and case law of the WTO DSB will be taken into account to determine the margin of discretion states enjoy in adopting effective measures against introduction of IAS into their territory. The main aim of this research is to outline the limits and leeway states have to strike a legally sound balance between international trade and international environmental obligations.

After providing an overview of the international framework, the IAS-Regulation and its impacts and effects within the EU will be examined. Particular attention will be given to the Member States' point of view. The procedural and material obligations and rights will be discussed to clearly describe the upcoming challenges for Member States. The Austrian legal system and its relevant legislation as well as the actions Austrian authorities have to take, due to the IAS-Regulation, will be illustrated. Then the focus will shift to the law of other Member States and their approach towards IAS. Especially Member States with similar federal structure and division of competences, e.g. Germany, fall within the scope of comparison. Based on previous findings a conclusion will be provided. This will include a comprehensive straightforward set of principles that need to be taken into account by the EU and its Member States.

3. State of Research

Due to its recent adoption and entrance into force the IAS-Regulation was yet not subject to a comprehensive legal research. Especially within the Austrian and German literature little references can be found. *Köck* discusses the issue of IAS within Germany and the EU, with regard to the development of the German IAS-legislation. He gives an introduction into the essential issues of the IAS-Regulation.²⁴ With regard to the international level research was done on WTO law as well as on the CBD. Foremost, guidelines on prevention, introduction and mitigation of impacts of alien species

²³ Art 12 IAS-Regulation.

²⁴ *Köck*, Die EU-Verordnung über invasive gebietsfremde Arten, NuR 2015/37, 73 ff.

were adopted by the CBD. Zleptnik's analysis of the non-economic objectives in WTO-Law is exemplarily cited with regard to the abundance of literature on international trade law.²⁵ Besides this, deep analysis of the IAS issue in WTO law, especially from a European point of view, is lacking. This thesis contributes to basic research in this field and will close the existing research gap. It will add an Austrian perspective to research in this field.

4. Research Question

The dissertations project based on afore outlined issues and problems will concentrate on the following research questions:

- 1. Which criteria define effective measures against IAS that are in compliance with international environmental and trade law obligations?*
- 2. Is the IAS-Regulation fully implementing the international obligations of the EU? Does the "Union list" comply with international requirements?*
- 3. Which responsibilities and rights arise from the IAS-Regulation? How are they implemented in the existing Austrian legislation?*

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²⁵ Zleptnig, Non-economic objectives in WTO law : justification provisions of GATT, GATS, SPS and TBT agreements (2010).

- b. General Agreement on Trade in Services (GATS)
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6. Expected Timeline

June 2015	Research of literature and decisions Presentation of thesis topic Exposé
July 2015 – July 2016	Drafting of dissertation thesis Revision of drafted parts, taking into account new developments due to the specific timeline of the IAS-Regulation
August 2016	Expected finalization
September 2016	Expected submission of the dissertation thesis Dissertation Defence

7. Preliminary bibliography

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